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Address Official Communications To
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MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Masao OSTAO, Chief, Fourth Section, Treaties Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau

For the American Embassy, Tokyo, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the American Embassy, Tokyo, Japan.

Date: Monday, May 12, 1952 TWENTY-FIRST INFORMAL MEETING

ARTICLE XII
(Additional Discussion)

Mr. Otabe referred to paragraph 3, Article XII (concerning the provision for the withdrawal of earnings and others "in foreign exchange in the currency of the other Party"). He asked whether Japan would be required to convert earnings and dividends into dollars for remittance by an American national or company which had invested only pounds sterling in Japan.

Mr. Adams replied that this Article did not impose such a requirement under the present circumstances. He added that, while the present inconvertibility of certain currencies persists, there would be no requirement that the earnings or dividends accruing from an invesmtnet made in some currency other than United States dollars be made available for remittance in dollars. Mr. Adams added that such conversion into dollars of earnings from a non-dollar investment would, however, be

appropriate if the identity of the original currency of investment were lost (e.g., if pounds sterling had been converted into Japanese yen for the purpose of investment, and the actual investment by the American national were thus expressed in yen only). Such a situation, however, would probably arise only when a greater degree of convertibility between various currencies was established, and the problem would be further clarified by the action of Japan's Foreign Investment Commission in approving the original investment. Since the Commission's favorable action is necessary to effect the investment itself, it would appear that agreement could be reached at that time between the Commission and the investor, and specific terms of future convertibility of earnings and dividends established, which would clarify whether dollar remittance would or would not be made available for earnings from non-dollar investment.

ARTICLE XV
(Additional Discussion)

Mr. Otabe then asked whether the phrase "30 days after publication" referred only to administrative requirements and restrictions, as mentioned in paragraph 1 of this Article, or whether it referredalso to the laws, regulations and administrative rulings mentioned in the first sentence of this paragraph.

Mr. Bassin replied that the phrase in question referred only to the new administrative requirements or restrictions mentioned in the second sentence of this paragraph. He pointed out that a previous statement had been made by American side (contained in the memorandum on the twelfth informal meeting of April 1, 1952) on this point, and that it would appear that some regulations or administrative rulings might - if they established new administrative requirements or restrictions - come within the scope of the 30-day advance publication provision. Mr. Bassin added that the 30-day provision was not intended to apply to laws, which became effective whenever a sovereign state so decided (usually upon promulgation), since impending legislation which might effect import-export trade was usually well known to the interested official and business circles in advance of its promulgation.

Additional Discussion of Definitions

Mr. Otabe asked for a clarification of the term "in like situation" as used in paragraphs 1 and 2, Article XXII. Mr. Singer replied that this could be interpreted to mean "under similar circumstances" or "in similar cases".

Mr. Kanematsu asked whether this phrase, "in like situation", would be used by the United States as a basis for the imposition of higher customs duties on Japanese articles - thus denying most-favored-nation privileges - on the grounds that Japanese goods were not manufactured under "like circumstances" (i.e., lower labor costs in Japan as compared with those in a third country).

Mr. Singer replied that this phrase would not be so used by United States customs authorities, and, further, that the intent of Article XXII was to accord national or most-favored-nation treatment, as the case might be, without qualification. Such treatment would be accorded in precisely the same manner as to nationals or to other countries "in like situations" (i.e., in similar cases or under like circumstances).

Mr. Otabe then asked, also in connection with Article XXII, whether it was possible for an American company to have its main office or "permanent seat" outside the United States, and whether an American firm could be both an American company and a French company at the same time.

Mr. Bassin replied that if a company's main office or "permanent seat" meant its domicile or place of incorporation, such a "seat" would definitely be in the United States. If the phrase used by Mr. Otabe meant a firm's principal or more important commercial office, it was possible that this be in some place other than its legal domicile. Thus, a "main office" (meaning only its most important business office and not its "main office" as its domicile or place of incorporation) could even be located outside the United States. He pointed out that many American concerns are established or incorporated in one state (where they may maintain a small office for legal purposes), but establish their principal places of business, or "main offices", in important cities, often in another state. Mr. Bassin added that an American company, duly organized under the laws in the United States, could not, without reorganizing or participating in another company, have the status simultaneously of a non-American company. If, for example, American stockholders held substantial interests in a French Company, the latter would be regarded solely as a concern organized under the laws of France, having none of the attributes of an American company.

Mr. Otabe stated that under the general company law (Article 57 of the Commercial Code) a Japanese company must be constituted by filing registration at the place of its main office or center of business. This rule applies to all types of commercial companies. Mr. Bassin replied that this concept of "main office" as a corporation's domicile or place of incorporation was also in customary use in the United States, where regulations of the same type that Mr. Otabe mentioned were in effect, that is, an American company must be legally domiciled in the United States. Mr. Bassin clarified that he had previously used "main office" also to indicate a larger commercial office (apart from the place of incorporation), which might be separate from the company's legal domicile.

In connection with Article XXII and Article IX, Mr. Otabe asked for a clarification of the status of "territories" and "possessions" of the United States.

Mr. Adams replied that Alaska and Hawaii are the only areas under the domain of the United States presently having the status of "territories"; these are organized under an Act of Congress and have a special and separate form of local government in the expectation that they will ultimately be admitted into the Union as one of the United States. A government of a territory is similar to that of a State Government, but it is under the authority of the Federal Government. A "possession", on the other hand, has no form of quasi-State Government structure, and is a place or area which is a dependency of the United States under the sole jurisdiction of the Federal authorities.

With reference to Article XIX, paragraph 4, Mr. Mori asked whether the phrase "to and from the territories of the other Party" referred to "products that may be carried by vessel" or to "the right to carry all products".

Mr. Singer replied that the phrase in question referred to the products that might be carried by vessel to and from the territories of the two Parties. He added, however, that this was not a matter of substance, since it was to be assumed that all the products of a country are susceptible of carriage by vessel between the two Parties.

Mr. Mori stated that the reason clarification was requested, as in most of the cases under discussion during the present meeting, was for the purpose of making as precise a translation into Japanese as possible.

Mr. Kanematsu then stated, also with reference to Article XIX, that paragraph 4 contained the phrase "than that accorded like products", while paragraph 2, Article XVI used the phrase "than that accorded to like articles". He suggested that for the sake of consistency the word "to" be added to the phrase in Article XIX.

Mr. Adams replied that there was no objection to revising the clause in paragraph 4, Article XIX, to read "no less favorable than that accorded to like products...", and that this revision could be made of record for the purpose of these informal discussions.

With further reference to Article XIX, Mr. Otabe asked for a definition of the word "haven", as used in paragraph 5.

Mr. Singer replied that the word "haven" in this connection meant any place of refuge, such as a harbor or sheltered anchorage, or other places of shelter or safety accessible to vessels in distress.

With reference to paragraph 3, Article XIX, Mr. Osato inquired whether the word "foreign" modified both "commerce" and "navigation" in the phrase "foreign commerce and navigation". He also inquired whether "friendly" referred both to "treatment" and "assistance" in paragraph 5, Article XIX.

Mr. Bassin replied that "foreign" referred both to "commerce" and "navigation", as used in paragraph 3. The word "firendly", however, would, for the purposes of translation, refer only to "treatment", since it was assumed that "assistance" of any kind implied a "friendly" assistance.

In connection with Article XVIII, Mr. Otabe asked whether the word "suit" in paragraph 3 referred to criminal as well as civil suits. Mr. Bassin replied that this word referred to civil suits, and that the additional phrase in this paragraph, "other liability", would undoubtedly cover criminal cases if the situation arose. He pointed out that the purpose of the Article was to ensure that no special privileges were extended to publicly-owned or controlled corporations, et cetera, in this regard, so that it was to be assumed that they would be held responsible for criminal acts. Nothing in the FCN Treaty, added Mr. Bassin, would give the director of such a corporation immunity while abroad, despite the fact that he would probably be a Government official. If immunity were to be claimed by such an individual, it would be necessary, if appropriate, to base this claim on something other than the treaty (e.g., diplomatic or official status, or some other agreement between the two countries).

Mr. Kanematsu asked whether the words "to which" in paragraph 3, Article XVIII, referred to "taxation, suit, execution of judgment or other liability" to which these enterprises are subject, or whether they referred only to the "other liability". Mr. Bassin replied that the words "to which" referred to the entire preceding clause, beginning with the word "taxation...".

Mr. Otabe then asked whether, in Article XVII, the "exclusive or special privileges", mentioned in paragraphs 1 and 2, referred to "monopolies", or "agencies", or both. Mr. Bassin replied that the phrase in question referred to both monopolies and agencies.

Also in connection with Article XVII, Mr. Mori asked whether the term "imports or exports", as used in the first part of paragraph 1, referred only to import and export products. Mr. Adams replied in the affirmative.

With reference to Article XV, Mr. Osato inquired whether "administrative ruling" could be translated as "administrative decision". Mr. Bassin replied in the affirmative.

Mr. Kanematsu then asked for a clarification of the difference in meaning between regulations and rulings, as used in this Article.

Mr. Bassin replied that a ruling was normally a decision made by a competent administrative or judicial authority, usually based on problems of interpretation arising in a specific case, and often applicable only to that particular case. A ruling, for example, could be made in interpretation of a regulation. The latter, added Mr. Bassin, implied a prescribed rule or set of rules, usually uniform in nature,

and of standard or general application. He added that a regulation could be drafted and formalized by a Government agency, and that it would then be administered by a competent - often a subordinate - official who might find it necessary to make administrative rulings or decisions on a case-by-case basis in order to implement the regulation in accordance with his interpretation.

Mr. Osato then asked whether the words "when warranted" as used in paragraph 2, Article XV, referred only to the word "correction". Mr. Singer replied that this interpretation of construction was correct.

Mr. Otabe asked for an explanation of the difference between "fines" and "penalities" as used in paragraph 2, Article XV.

Mr. Bassin replied that a "fine" was the imposition of a penalty calling for the payment of a specific sum of money; "penalties", often a general term including "fines", would in this case refer to other punishments meted out by the authorities, such as the temporary loss of a license to do business, or other methods to penalise an individual or company for an illegal act.

With reference to Article XIV, Mr. Mori asked for a clarification of the meaning of the term "products destined for", as used in paragraph 1. He stated that it was necessary to define with some degree of precision the point at which products became "destined" for exportation to another country.

Mr. Singer replied that, as this word is used in Article XIV, paragraph 1, a product would normally be "destined" for export to a country whenever it was capable or susceptible of actually being exported. He added that in other cases apart from Article XIV, particularly in the case of raw materials or unfinished goods, it was possible that goods would be "destined" for export whenever a contract had been concluded by the exporter.

Mr. Otabe then asked whether manufactured goods would be considered "destined" for export to a particular country even before their manufacture. He stated that such an interpretation would imply that the allocation of critical raw materials required for their manufacture would also have to be conducted on a most-favored-nation basis with respect to the ultimate buyer. It would, of course, be most difficult, if not impossible, to carry the interpretation of "destination" to that extreme point.

Mr. Adams replied that the most-favored-nation treatment standard established in Article XIV would not be applicable beyond the point of manufacture, and would have no effect on the allocation of critical raw materials. He added that a foreign buyer would normally be expected to place his orders with firms who had already acquired, or had been assured, the needed materials.

In connection with paragraph 4, Article XIV, Mr. Osato asked whether the phrase "of a non-commercial nature" referred both to "sanitary grounds" and to "other customary grounds". Mr. Bassin replied that the phrase referred to both, but that, since "sanitary grounds" were clearly of a non-commercial nature, it was necessary to qualify only the phrase "other customary grounds".

With reference to Article XIII, Mr. Otabe asked whether the clause beginning with the word "including..." referred only to "other matters" or to "customs and other matters". Mr. Bassin replied that this clause referred to "customs and other matters".

Mr. Otabe then asked whether the final clause of this Article ("and regulations governing the exercise of their functions") was a subordinate clause following the word "including", or whether this paragraph could be read to mean "in respect of the customs and other matters,..., and (in respect of) regulations governing the exercise of their functions".

Mr. Bassin replied that the latter interpretation of this sentence was correct.

In connection with Article XII, Mr. Kanematsu asked for a definition of "financial instruments". Mr. Bassin replied that these were written acknowledgments or certificates pertaining to financial transactions; among them are letters of credit, drafts, cashier's checks, personal and travellers' checks, and all forms of negotiable documents referring to financial transactions.

Mr. Otabe then asked whether the phrase "giving consideration to special needs for other transactions" in paragraph 3, Article XII, referred only to the preceding clause (c), or whether it referred to all the previous clauses (a), (b) and (c). Mr. Singer replied that this phrase referred to the earlier part of the sentence, i.e. "make reasonable provision for the withdrawal", and that this phrase was therefore in addition to, or separate from, clauses (a), (b) and (c).

Mr. Mori stated that it was the understanding of the Japanese representatives that the phrase in question meant that Japan would make foreign exchange available for the withdrawal of amounts under clauses (a), (b) and (c) after consideration of Japan's special needs for other transactions (such as its contribution to the International Monetary Fund or other international obligations).

Mr. Adams replied that Mr. Mori's understanding in this connaction was correct.

With reference to Article XI, Mr. Mori asked whether the term "gainful pursuit", as used in paragraphs 1 and 2 of this Article had the same meaning as "gainful occupation", as used in paragraph 4, Article XXI.

Mr. Singer replied that "gainful occupation" is somewhat narrower in scope than "gainful pursuit"; the former implies "taking a job", and is therefore limited to the activities of an individual within the territories of the other Party (as evidenced by the phraseology employed in Article XXI); the latter phrase, "gainful pursuit", is much broader in character and may include non-business activities. Moreover, added Mr. Singer, residence is not necessary to engage in some "gainful pursuit", as is clear from paragraph 4, Article XI, while residence is essential in most cases to a "gainful occupation". He added that he believed that these terms were correctly employed in the two Articles under discussion, and suggested that this distinction be carried into the Japanese translation.

With further reference to Article XI, Mr. Otabe then asked for clarification of the words "allocable" and "apportionable", as used in paragraph 4. He added that there were Japanese terms equivalent to these English words, but that the former (and possibly the latter) were so much alike that it would appear best to use only one word in lieu of the present two. He suggested, therefore, that the word "apportionable" be deleted from this paragraph, leaving only "allocable". Mr. Otabe stated that he believed that the latter word alone would suffice, but he invited the American side to comment on the need for both words.

Mr. Adams replied that these two words referred to the "income, capital or other basis" on which taxes were to be assessed. Article XI therefore stipulates that taxes, fees or other charges shall be imposed only on that portion of a foreign company's income or capital which is truly representative of its local branch's share of business profits or investment. The Article ensures that a Japanese company's branch in the United States, for example, will not be assessed taxes on a greater share of profits or investments than may reasonably be attributed to the branch itself, excluding the company's main office in Japan and its other foreign branches. In some business enterprises, added Mr. Singer, it is difficult to determine the exact return from an investment in some country or the extent of a company's profits, particularly where the company's operations are international in character. It was usual, therefore, for some companies to allocate or apportion a share of its total returns and of its total expenditures to each of its various branches. In order that all possible ways of determining this share, the standard draft uses both words, "allocable" and "apportionable"; the former implies the assignment or allotment of a share of total revenue on a percentage basis, often somewhat arbitrary and usually in unequal proportion; the word "apportionable", on the other hand, implies an equal division among the various participants. Mr. Adams then added that both words were used in the standard draft's phrase "or other basis in excess of that reasonably allocable or apportionable to its territories", as well as in the following clause concerning deductions and exemptions (which should not be less than those reasonably allocable or apportionable) simply in order to cover the various methods (proportionate or otherwise) by which a company's returns through a given foreign branch might be determined. Mr. Adams added that he would refer

Mr. Otabe suggested deletion of one of these words to the Department of State, but that he believed the Department would agree with the American representatives that both words were necessary to paragraph 4, Article XI.

Mr. Kanematsu then inquired, with reference to Article IX, whether the word "occupying" (paragraph 2), used in connection with immovables, and the word "possessing" (paragraph 4), in connection with movable properties, had the same meaning.

Mr. Bassin replied that these words were not entirely alike, since ownership was not essential to occupation. Possession, which might be defined as "holding", usually implied ownership, the entire legal concept being best expressed in the phrase "to own and possess". As used in paragraph 4 of this Article, the word "possessing" referred to personal property of all kinds, and thus was a part of the full legal concept of ownership, i.e. "owning and possessing".

Mr. Kanematsu then stated, with further reference to Article IX, that property in Japan is classified as tangible or intangible, and that tangible properties are further divided into movables and immovables. The "intangible personal properties" mentioned in paragraph 4 are of a category unknown in Japan. Mr. Kanematsu added that intellectual property rights such as copyrights are treated as special types of property rights, and that a debt, incorporated in an instrument, was regarded as a movable property. Mr. Otabe asked for an illustration of "intangible personal property" in the United States, and further inquired whether movable and personal properties came under the same laws in the United States.

Mr. Bassin replied that movable and personal properties were treated similarly in the United States. He added that the debts, patents, and other similar intangibles were regarded as intangible personal properties in the United States, and that it appeared that this concept was identical with that of "movable properties" or, in some cases, the special intangible rights mentioned by the Japanese side.

Mr. Otabe then asked for a definition of the word "interests" as used in the phrase "alien ownership of interests in enterprises", paragraph 4, Article IX.

Mr. Bassin replied that "interests" meant shares, stocks, partnerships, or any other kind of right susceptible of ownership. He added that mortgages, debts and debentures could also be considered as "interests in enterprises", but not necessarily as interests which pertain to the control of an enterprise unless specifically so provided.

In connection with Article VIII, Mr. Otabe asked for an explanation of the meaning and scope of the term "executive personnel" in paragraph 1, and further inquired whether this term included employees holding the higher positions in a company.

Mr. Singer replied that this term meant the responsible officials of a company, including, but not limited to, directors and managers, and that it was regarded as covering the higher employees of a company.

With further reference to paragraph 1, Article VIII, Mr. Otabe then asked if there was a clear-cut difference between the words "examinations" and "technical investigations".

Mr. Singer replied that examinations were more general in nature, and would include inquiries and surveys concerning investment possibilities, general business, financial, accounting and personnel problems. Technical investigations, on the other hand, were more specific in character, and would include, among other similar studies, those conducted by engineers, production experts, research personnel, laboratory and testing technicians, and other experts with respect to some specific aspect of investment, the establishment of a factory or enterprise or the production of some article.

Mr. Mori then asked whether the term "within such territories" at the end of paragraph 1, Article VIII, referred both to "their enterprises" and to "enterprises in which they have a financial interest". Mr. Bassin replied in the affirmative, that is, that the term "within such territories" applied to both the preceding clauses.

Mr. Otabe then referred to Article V, and asked whether the term "access to the courts of justice and to administrative tribunals and agencies" in paragraph 1 was intentionally broader than the term "access to courts" as used in paragraph 1 (e), Article XXI. Mr. Bassin replied that "access to courts" in the latter Article was interpreted to mean "access to the courts of justice and to administrative tribunals and agencies", as used in Article V.

Mr. Otabe stated that if this were the proper interpretation he believed that the phrase "access to courts" in Article XXI should be expanded to include the phraseology of Article V since this would then be consistent as well as clearer to the Japanese side.

Mr. Adams stated that for the purpose of these informal discussions, the latter part of paragraph 1 (e) Article XXI would be amended to read "and with respect to access to the courts of justice and to administrative tribunals and agencies" as proposed by the Japanese side, and that this point would be referred to the Department of State for its consideration.

Mr. Kanematsu then asked, with reference to Article I, for a clarification of the word "persons", and its relation to the phrase "of nationals and companies".

Mr. Bassin replied that the word "persons" in this connection meant the "bodies" of the nationals mentioned. Legally, he added, a "person" was any human being, corporation, or body having legal rights and duties.

Thus, the word "persons" might properly be translated in such a way as to express both the idea of the "bodies" of the individual nationals, as well as of the "personalities" of the companies. Mr. Bassin added that, with respect to companies, mention was made of "property, enterprises and other interests". No specific mention was made, however, (other than by so interpreting the word "persons") of the juridicial status or existence of such companies. Thus, the concept of "persons" or "bodies" should properly be interpreted to cover both the physical bodies of the individual nationals and the existence of the companies mentioned.

Mr. Otabe then referred to the phrase "within the territories of the other Party", used in several places throughout the present FCN Treaty. He stated that the Japanese side desired to insert this phrase in several additional places, or to change the location of this phrase within some of the sentences where it is now found. He accordingly proposed that paragraph 2, Article II, which now reads "Nationals of either Party, within the territories of the other Party, shall be permitted...", be revised to read "Nationals of either Party shall, within the territories of the other Party, be permitted...".

Mr. Adams replied that there appeared to be no objection to such a change in phraseology, and stated that this revision could be made of record for the purposes of these informal discussions, subject to approval by the Department of State.

Mr. Otabe then proposed that paragraph 1, Article III, which now reads "Nationals of either Party within the territories of the other Party shall be free from unlawful molestations...", likewise be amended to read "Nationals of either Party shall, within the territories of the other Party, be free...".

Mr. Adams replied Mr. Otabe's proposed amendment would be made of record for the purposes of these informal discussions, and would be referred to the Department of State for consideration.

Mr. Otabe then proposed that paragraph 1, Article V, which now reads "Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party,...", likewise be revised to read "Nationals and companies of either Party shall, within the territories of the other Party, be accorded...".

Mr. Adams replied that the phrase "within the territories..." in this phrase referred to the courts, tribunals and agencies, and not necessarily to the "nationals and companies". Reference to the latter alone would imply that access to the courts, et cetera, would be accorded only to those nationals and companies who were within the territories of the Party. Such a limitation, based on the concept

of residence, was not believed to be intended by the first sentence, paragraph 1, Article V. However, he added, the second sentence of this paragraph clearly extends the same privilege of such access to courts, et cetera, to non-resident companies. It was therefore believed that the change proposed by Mr. Otabe, while modifying the original intent of the standard draft to some extent, might be acceptable in view of the extension of this privilege to non-resident companies in the second sentence of this paragraph. Mr. Adams suggested therefore that the revision proposed by Mr. Otabe be made of record tentatively pending its consideration by the Department of State.

Mr. Otabe then proposed that paragraph 3, Article IX, which now reads "Nationals and companies of either Party shall be permitted freely to dispose of property within the territories of the other Party..." likewise be amended to read "Nationals and companies of either Party shall, within the territories of the other Party, be permitted...".

Mr. Adams replied that the phrase in question clearly referred to the properties, and not to the nationals and companies, within the territories of the other Party. He believed that an amendment as proposed by Mr. Otabe would imply that only the nationals and companies resident within the territories of the other Party could dispose of their properties freely, whereas the intent of this Article was to ensure that nationals and companies, whether resident or not, might dispose of their properties in the other country. The all-inclusive concept with reference both to residents and non-residents was clarified by the mention of acquisition through testate or intestate succession. He added that it was believed that Mr. Otabe's proposal with respect to this particular paragraph would probably not be favorably considered by the Department of State for the reasons cited above. Mr. Adams added, however, that Mr. Otabe's proposal would be referred to the Department of State.

It was then agreed that Mr. Mori and Mr. Miyagawa would, at their earliest convenience, discuss with Mr. Adams the corrections and additions to the various memoranda of conversation which might be proposed by the Japanese side. It was agreed that efforts would be made to expedite the preparation of final texts of these memoranda acceptable to both sides. Mr. Otabe then stated that further consultation with other interested Ministries of the Japanese Government, on the various points discussed during these informal meetings would begin shortly. It was agreed that the final review meetings on the present round of informal discussions could be held in about three weeks' time (i.e., about the second week in June, 1952). It was further agreed that the primary purpose of the final review meetings was to confirm previously proposed amendments to the standard draft which might be acceptable to both sides, and to establish and clarify the points, if any, which might remain for formal negotiation.

The meeting was then adjourned with the understanding that final review meetings would begin on or about June 9, 1952, subject to mutual agreement.

/s/ M. Yukawa

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